MALAYAN BANKING BHD

v.

FU XING ALUMINIUM DAN KACA SDN BHD

HIGH COURT MALAYA, IPOH
BALIA YUSOF WAHI J
[ORIGINATING SUMMONS NO: 24-1446-2003]
15 NOVEMBER 2006

LAND LAW: *Charge - Order for sale - Notice of default - Form 16D - Quantum claimed - Amount due and owing computed upon wrong interest rate - Whether resulting in wrong amount claimed - Whether cause to the contrary - Whether order for sale to be refused - National Land Code, s. 256*

The plaintiff bank had granted various banking facilities to the defendant. The facilities were secured upon a charge created by the defendant. Upon default, the plaintiff sought to sell off the charged land, and consequently issued and served upon the defendant the statutory Form 16D. The defendant argued that no order for sale ought to be granted, as Form 16D was fatally flawed. According to the defendant, the sum of RM3,862,530.05 claimed therein was computed upon an incorrect rate of interest, and hence did not reflect the correct amount due and owing to the plaintiff. The facts showed that the plaintiff, in extending the various types of facilities thus, had agreed to apply different rates of interest thereto. However, in demanding repayment *vide* Form 16D herein, the plaintiff invoked and applied only the 2.25% interest rate per annum above the base lending rate on daily rest that applied exclusively to overdraft facility, and ignored the 2.00% rates that applied to package 2 of the facilities. The defendant objected to the recourse so resorted to by the defendant, contending that it had resulted in an incorrect sum being claimed. The issue that arose was whether the defendant's objection had merits, and had showed cause to the contrary within the meaning of s. 256(3) National Land Code.

Held (refusing order for sale):

(1) The plaintiff filed altogether ten affidavits in support of its claim but none had addressed the objection of the defendant as to the uncertainty of how the figure stated in Form 16D was arrived at. While the plaintiff is not expected to give a detailed statement of account as to its claim in the Form 16D, it is trite law that the precise amount claimed by a chargee should be stated in the notice of demand. Consequently, the amount claimed in the notice must be the correct amount due and owing to the plaintiff and calculated on the right terms and the correct rate of interest as agreed between the parties. (para 5)

(2) Form 16D as served on the defendant showed that the sum of RM3,862,530.05 claimed as due and owing was computed at the prescribed rate of 2.25%per annum above the base lending rate of 6% on daily rest. It therefore appears that the whole amount due and owing was computed at a rate which differs from the interest rates as stated in the letter of offer. The different interest rates stated in the letter of offer refers to the different facilities and not just a flat rate of 2.25% per annum as stated in the notice of demand. (para 5)

(3) The defendant had demonstrated that the chargee had failed to meet the conditions precedent for an order for sale in that the notice in Form 16D does not state the amount lawfully due under the charge. The defendant therefore had shown cause to the contrary within the meaning of s. 256(3) of the Code. Consequently, the plaintiff's application for an order for sale ought to be refused. (para 8)

Case(s) referred to:

Asia Commercial Finance (M) Bhd v. Kimden Housing Development Sdn Bhd [1993] 1 CLJ 487 HC ***(refd)***

Lum Choon Realty Sdn Bhd v. Perwira Habib Bank Malaysia Bhd [2003] 3 CLJ 791 CA ***(refd)***

Low Lee Lian v. Ban Hin Lee Bank Bhd [1997] 2 CLJ 36 SC ***(refd)***

Legislation referred to:

National Land Code, s. 256(3)

For the plaintiff - Elizabeth Regina Wong; T/n Lu Peen & Tunku Alina

For the defendant - Vincent Tey Wei Seng; M/s Ranjit Ooi & Robert Low

Reported by Rose Aziz

JUDGMENT

Balia Yusof Wahi J:

[1] The plaintiff applied for an order for sale of the defendant's property and the defendant claims that the said application is bad in law and ought not to be granted. The defendant claims it has shown a cause to the contrary in opposing the application.

[2] The defendant's land was charged to the plaintiff on 12 August 1999 as a security for the repayment to Malayan Banking Berhad for all monies owing for the facilities provided to the defendant totalling RM3,750,000. Exhibit MBB1 in encl. 2 is the letter of offer enclosed in the plaintiff's affidavit in support of this application and it states the various types of facilities granted to the defendant. Paragraph 4 of encl. 2 which is reflective of the terms provided in the letter of offer (exh. MBB1) sets out as follows:

	Kemudahan	Tahap (RM)	Kadar Faedah Berkuatkuasa
	Overdraft	450,000-00	2.25% setahun atas Kadar Pinjaman Asas*, pada dasar kiraan harian
Tradeline Facilities - Package 1 -	Letter of Credit (LC)		Association of Banks in Malaysia rate
	Trusts Receipts (TR)	1,300,000-00	8.5% setahun
	Bank Acceptance (BA)		8.5% setahun
Tradeline Facilities - Package 2 -	Letter of Credit (LC)		Association of Banks in Malaysia rate
	Trusts Receipts (TR)	2,000,000-00	2.00% setahun atas Kadar Pinjaman Asas*
	Bank Acceptance (BA)		2.00% setahun atas Komisyen Penerimaan

* *Kadar Pinjaman Asas semasa ialah 6.00% setahun berkuatkuasa dari 23/05/2003.*

[3] In issuing the notice of default with respect to the charge in Form 16D, the plaintiff indicated (exh. MBB6 in encl. 2) as at 31 August 2003, the amount due and owing to the plaintiff is RM3,862,530.35 and the prescribed interest rate was put at 2.25% per annum above the base lending rate on daily rest. Over and above that, the plaintiff also imposed a penalty interest of 1% per annum over and above the aforesaid prescribed interest rate on the entire outstanding amount from the date of default until full settlement subject to a minimum charge of RM5. It is to be noted at this stage that the plaintiff has the right to impose the additional 1% penalty interest as was clearly stated in the plaintiff's letter of offer dated 20 December 2001.

[4] The challenge put up by the defendant is premised on the ground that the Form 16D issued by the plaintiff is defective and null and void and the defendant further disputes the amount stated therein on the ground that the rate of interest imposed by the plaintiff was wrong. The defendant filed an affidavit in reply *via* encl. 9 and through the same has clearly demonstrated before this court that in the letter of offer by the plaintiff, the defendant was accorded with various types of facilities including overdraft facilities which carries with it different rates of interest. However, in issuing the Form 16D as exhibited in exh. MBB6 of encl. 2, the rate of interest sought to be claimed by the plaintiff differs from the rate as stated in the letter of offer exhibited as exh. MBB1 of the same enclosure. The defendant also contended that the plaintiff has no right to impose the 1% penalty interest and further claim that the amount demanded in the Form 16D is unclear as to whether it has included the said penalty interest. On the defendant's objection to the additional 1% interest imposed, I do not think there is any merit in its argument as the plaintiff has the right to do so as per the terms and conditions mentioned in the letter of offer and furthermore the plain reading of the said Form 16D leaves no doubt whatsoever.

[5] In reply to encl. 9, the plaintiff has filed encl. 10 contending that the plaintiff is not bound to give any statement of account relating to its claim in the Form 16D and mentions that the interest rate applied was correct and it is within its power to impose the additional 1% penalty interest. It is to be noted that the plaintiff filed altogether ten affidavits in support of its claim but none of these did address the objection of the defendant as to the uncertainty of how the figure stated in the Form 16D was arrived at. While it is not expected for the plaintiff to give a detailed statement of account as to its claim in the Form 16D, it is trite law that the precise amount claimed by a chargee should be stated in the notice of demand. I take it that the precise amount claimed in the notice must be the correct amount due and owing to the plaintif as calculated on the right terms and the correct rate of interest as agreed between the parties. The whole idea behind this is simply to let the chargor knows the actual and correct figure that he has to pay in order to redeem the said property. (See: *Lum Choon Realty Sdn. Bhd. v. Perwira Habib Bank Malaysia Bhd.* [2003] 3 CLJ 791 CA). From my reading of the Form 16D served on the defendant, it is clear that the sum of RM3,862,530.05 due and owing to the plaintiff was computed at the prescribed interest rate of 2.5% per annum above the base lending rate of 6% on daily rest. It appears that the whole amount due and owing to the plaintiff was computed at the stated rate of 2.5% per annum which differs from the interest rates as stated in the letter of offer. The different interest rates stated in the letter of offer refers to the different

facilities and not just a flat rate of 2.5% per annum as stated in the notice of demand in Form 16D. The plaintiff affidavit in support in encl. 2 does not indicate at what interest rate the sum claimed in the Form 16D was arrived at even though para 4 of the same provides for three different rates for the various types of facilities accorded to the defendant. This leaves the defendant very much in a state of doubt.

[6] In the light of the above stated facts, I found there are merits in the defendant's objection to the amount stated in the notice of demand. In an action of this nature, the defendant chargor has merely to show cause to the contrary within s. 256(3) of the National Land Code and among the many ways which he can do so is to show to this court that the notice demands a sum which is not lawfully due to the chargee. (See: *Low Lee Lian v. Ban Hin Lee Bank Bhd.* [1997] 2 CLJ 36 SC.)

[7] Although as I have said earlier, the plaintiff has filed a total of 10 affidavits stating the amount due and owing at the various dates of the affidavits, those computations were based on the original amount of RM3,862,530.05 stated is the notice of demand in Form 16D. Since that figure is in the first place being questioned and remained ambiguous, the filing of the subsequent affidavits computing the amount due and owing at those dates of the affidavits are of no use and significance. They do not in any way explain or certify that the amount claimed at the very first instance is correct. The defendant has therefore lost the opportunity to satisfy itself of the correctness of the amount claimed by the plaintiff. It is unable to challenge it and to show how much it admits owing the plaintiff. There is a failure of the plaintiff in this case to state the exact and correct amount outstanding and the interest charged under the said charge. (See: *Asia Commercial Finance (M) Bhd. v. Kimden Housing Development Sdn. Bhd.* [1993] 1 CLJ 487 HC).

In the circumstances of the case, I am of the view that the defendant has succeeded in demonstrating that the chargee has failed to meet the conditions precedent for an order for sale in that the notice in Form 16D does not state the amount lawfully due under the charge. The defendant has shown a cause to the contrary under s. 256(3) of the National Land Code and the plaintiff's application for an order of sale ought to be refused. Accordingly, the plaintiff's application is hereby dismissed with costs.